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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 422

CITY OF KANSAS CITY, MISSOURI, *Petitioner,*

v.

FEDERAL PACIFIC ELECTRIC COMPANY
and
GENERAL ELECTRIC COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION OF WESTINGHOUSE ELECTRIC CORPORATION AND ALLIS-CHALMERS MANUFACTURING COMPANY FOR LEAVE TO FILE BRIEF AMICI CURIAE IN OPPOSITION AND BRIEF

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October 9, 1962

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Westinghouse Electric Corporation (Westinghouse) and Allis-Chalmers Manufacturing Company (Allis-Chalmers) respectfully move the Court for leave to file

the attached brief *amici*. Petitioner has refused to consent to the filing of such brief.

Westinghouse and Allis-Chalmers are two of the defendants in the more than 1700 electrical equipment treble damage suits now pending in the federal courts. Petitioner seeks review of a question which is germane to the vast majority of those cases. While the circumstances of the present case are such that Westinghouse and Allis-Chalmers have not been included as defendants in this action, they are parties in substantially all other jurisdictions where the question presented in the petition has been or will be decided. Accordingly, in a very real sense, Westinghouse and Allis-Chalmers are parties in interest in the present proceeding and, therefore, they request leave to file the attached brief in opposition to the petition.

Respectfully submitted,

RICHARD S. RIGHTER,
CARL E. ENGGAS,
Attorneys for Westinghouse Electric Corporation and Allis-Chalmers Manufacturing Company

JOHN H. PICKERING
Of Counsel

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BRIEF FOR WESTINGHOUSE ELECTRIC CORPORATION AND ALLIS-CHALMERS MANUFACTURING COMPANY AS AMICI CURIAE IN OPPOSITION

INTEREST OF AMICI CURIAE

The interest of Westinghouse Electric Corporation and Allis-Chalmers Manufacturing Company, as *amici curiae*, is set forth in their motion for leave to file this brief, to which motion this brief is annexed.

QUESTION PRESENTED

Whether the interpretation of § 4B of the Clayton Act (15 U.S.C. § 15(b)), which applies a four-year statute of limitations to private antitrust actions, is of such imperative public importance as to justify deviation from normal appellate processes and require immediate settlement in this Court, prior to judgment in the Court of Appeals.

RULE INVOLVED

Rule 20 of the Rules of this Court which reads:

"20.

"CERTIORARI TO A COURT OF APPEALS BEFORE JUDGMENT.

"A writ of certiorari to review a case pending in a court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court. See *United States* v. *Bankers Trust Co.*, 294 U.S. 240; *Railroad Retirement Board* v. *Alton R. Co.*, 295 U.S. 330; *Rickert Rice Mills* v. *Fontenot*, 297 U.S. 110; *Carter* v. *Carter Coal Co.*, 298 U.S. 238; *Ex parte Quirin*, 317 U.S. 1; *United States* v. *United Mine Workers*, 330 U.S. 258; *Youngstown Co.* v. *Sawyer*, 343 U.S. 579."

STATEMENT

On February 9, 1962, petitioner sued respondents in the Western District of Missouri under § 4 of the Clayton Act (15 U.S.C. § 15) for treble damages.* Petitioner's claims arise out of the matters which were

* Petitioner filed a separate suit against each respondent, but the matter has been treated as one case by the filing of a single petition for certiorari here.

the subject of civil and criminal proceedings by the United States in the Eastern District of Pennsylvania in 1960 against manufacturers of electrical equipment, and are part of the 1700-odd treble damage actions which have been brought as a result of those proceedings.

Because the transactions sued upon here had occurred more than four years prior to the filing of the complaints, petitioner sought to avoid the four-year limitation of § 4B of the Clayton Act (15 U.S.C. § 15(b)) by alleging that respondents had "fraudulently concealed" the existence of the asserted conspiracy until a date within the limitations period. On July 16, 1962, the district court sustained respondents' motions to dismiss and for summary judgment, on the ground that the doctrine of "fraudulent concealment" did not operate to toll § 4B, and that the claims were time barred. On the same day petitioner appealed to the Court of Appeals for the Eighth Circuit and the case was thereafter specially advanced on its docket. Subsequently, on September 10, 1962, petitioner filed the instant petition for certiorari in advance of judgment by the Court of Appeals. Meanwhile, the case has been briefed in that court, was argued before it on October 2, 1962, and is now awaiting decision by it.

ARGUMENT.

This case does not come within the requirements laid down by Rule 20 of this Court for the extraordinary procedure of review in advance of judgment by the Court of Appeals. Petitioner fails to make the showing required by the Rule and instead argues in effect simply (1) that the question decided by the district court (erroneously, in petitioner's view) must even-

tually be settled by this Court, and (2) that the decision of the district court has brought the electrical equipment litigation throughout the country to "a standstill". The first argument is insufficient and the second is incorrect.

1. This Court has emphasized that the power to by-pass the courts of appeals "has been exercised but rarely", and has made clear that it is not enough to have an important question which requires prompt adjudication. *Aaron* v. *Cooper*, 357 U.S. 566, 567. Accordingly, and as the earlier cases cited in Rule 20 illustrate, the grant of certiorari before judgment by a court of appeals is reserved for situations which are both of such overwhelming public importance and so emergent in nature as to leave no other choice.

That is not the case here. Instead, all relevant considerations—the unprecedented volume of the electrical equipment treble damage actions, the great number of parties, the magnitude of the damages claimed, the fact that money judgments are the only relief sought, and the fact that this litigation is "protracted litigation" which is being specially handled under the auspices of the Judicial Conference (Pet. 5) and is proceeding in an expeditious fashion—bespeak the wisdom of requiring the full measure of judicial consideration and adherence to the normal appellate processes. The issue raised here—whether the doctrine of "fraudulent concealment" applies to § 4B of the Clayton Act—is involved in many of the suits but has not yet been ruled upon by any court of appeals in the context of this litigation. Such rulings will not be long in coming, for the issue is presently before numerous

district courts and has been decided by seven.* Indeed, it may be decided at any moment by the Court of Appeals below which heard argument on October 2, 1962, less than eight months after the instant case was begun.

Whether this Court will have to review the rulings of the courts of appeals will depend, of course, upon circumstances as they develop, including whether conflicting or uniform views emerge, and the importance of the matter. Meanwhile, neither the possibility that this Court may eventually have to pass on the issue, nor the claim that it has been erroneously decided by the district court here, warrants foregoing the benefit inherent in intermediate consideration by the courts of appeals.

2. It is not the case, as suggested by petitioner (Pet. 6), that litigation of the 1700-odd electrical equipment treble damage actions has been halted by the decision last July of the district court in this case. This Court

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* There are two other unreported district court decisions in accord with the decision of the district court in this case: *Brigham City Corporation, et al.* v. *General Electric Company, et al.* (District of Utah, September 28, 1962, No. C 16-62, and related cases); *Public Service Company of New Mexico* v. *General Electric Company, et al.* (District of New Mexico, July 31, 1962, No. 4924 Civil, and related cases). There are four unreported district court decisions to the contrary: *Atlantic City Electric Company, et al.* v. *General Electric Company, et al.* (Southern District of New York, July 11, 1962, 61 Civ. 4258, and related cases, Pet. App. B); *Commonwealth Edison Company, et al.* v. *Allis-Chalmers Manufacturing Company, et al.* (Northern District of Illinois, August 28, 1962, Civil Action No. 61 C 1277, and related cases, Pet. App. C); *United States of America and Tennessee Valley Authority* v. *General Electric Company, et al.* (Eastern District of Pennsylvania, August 22, 1962, Civil Action No. 29379, and related cases); *Public Service Company of Colorado, et al.* v. *Allen-Bradley Company, et al.* (District of Colorado, September 11, 1962, Civil Action No. 7349, and related cases).

can take notice of the continuing activities of the Judicial Conference and the Subcommittee on Multiple Litigation of the Judicial Conference Committee on Pretrial Procedure to promote orderly discovery and trial preparation of this volume of cases. Under such auspices, these cases are proceeding rapidly in all jurisdictions. The recommendations of that Subcommittee are being carried out, discovery is proceeding, a voluminous bulk of material is being produced, and depositions are now being conducted.

3. Finally, it falls to these *amici*, who are defendants in many of the actions throughout the country but who were not joined as defendants in this case, to point out that the present petition involves only one of the hundreds of plaintiffs and only two of the numerous defendants in the mass of the electrical equipment litigation. Thus, this case not only fails to meet this Court's criteria for the extraordinary step of review before judgment by the Court of Appeals, but is a singularly inappropriate one for such review since many of the persons who would be affected would not be in a position to be heard as parties.

CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted,

RICHARD S. RIGHTER
CARL E. ENGGAS
Counsel for Westinghouse Electric Corporation and Allis-Chalmers Manufacturing Company, as amici curiae.

JOHN H. PICKERING
Of Counsel.

October 9, 1962.